Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of

Review of the Pioneer's
Preference Rules

Amendment of the Commission's Rules
To Establish New Personal
Communications Services

ET Docket 93-266
Gen. Docket 90-314

AMERICAN PERSONAL COMMUNICATIONS EMERGENCY REQUEST FOR ORAL ARGUMENT

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July 21, 1994

SUMMARY

In its extraordinary remand request to the Court of Appeals in this case and in last week's Mtel decision, the Commission has given a clear signal that it intends to levy heavy fees on the broadband PCS pioneers because of the "competitive implications" of granting the pioneers "free" licenses -- "free" only if the high-stake costs, ingenuity and contributions of the pioneers are discounted to zero. The Commission has never before raised this issue and has entertained no comment on it. On an expedited basis, therefore, the Commission should schedule an oral argument on this apparently critical matter.

First, the Commission's own experience with spectrum-based industries should demonstrate that its concern about "competitive implications" is misplaced or greatly exaggerated. Moreover, for reasons that can be developed in oral argument, we believe the economic premises for the concern are profoundly and demonstrably mistaken. And last year's auction legislation explicitly prohibits the Commission from acting out of a desire to raise revenues.

Second, even if APC could properly be required to pay for its license, the setting of this payment must take into account, and balance against the purported "competitive implications," various other factors. The Commission has represented to the Court that it would consider all such factors, and oral argument would facilitate that process.

Third, oral argument is the quickest, most effective way to focus on these issues. The Commission recently benefited from this procedure on reconsideration of its PCS rulemaking. It should resort to it again as the best means to ventilate this brand new set of issues and to meet its obligation to the Court to act within two weeks of remand (or on reconsideration).

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TO COMMISSIONERS QUELLO, BARRETT AND NESS:

APC'S EMERGENCY REQUEST FOR ORAL ARGUMENT

In its "Emergency Motion for Remand" filed with the Court of Appeals on July 8, 1994 (at 4-5), the Commission stated as the basis for its remand request that its "understanding of the PCS marketplace and the auction process has developed as it has resolved various issues." The Motion went on to say that "the Commission now has a fuller understanding of the competitive implications of one licensee receiving its license without payment while its competitors, under an auction process, must pay significant amounts for their licenses." The Commission reiterated this point in an order that was released five days after the filing of its Emergency Motion, when it conditioned the grant of Mtel's narrowband PCS license upon a substantial payment and claimed that it had come to a "further understanding of the auction process and the competitive effect of pioneer's preference recipients . . . receiving licenses for free" by virtue of the four reports that the Commission had issued in connection with competitive

bidding and general auction rules. See Nationwide Wireless Network Corp., FCC 94-189, ¶ 17 (FCC File No. 22888-CD-P/L-94, July 13, 1994).[1/]

American Personal Communications ("APC")[2/] files this Emergency Request For Oral Argument to address this issue, which is given such prominence in the Commission's Motion but which has never been developed on the record before the Commission. The reasoning behind the Commission's concern about "competitive implications" appears to be that a PCS licensee on Block B which has to submit the highest bid to win that license will be handicapped in competing with the pioneer on Block A which obtains its license for "free." (The concept of "free," of course, denigrates, or at least ignores, the commitment, sacrifice, hard work, creativity, risk-taking and substantial high-risk investments, in APC's case exceeding $20 million, incurred by the pioneers).[3/]

[1/] The orders that the Commission has entered in connection with competitive bidding and the auction process, including the Fifth Report and Order released on July 15, 1994, never discussed the effect of "free" pioneer licenses either on competition among PCS providers or on the auction process itself. The most pertinent statement made by any member of the Commission in the course of promulgating those orders is the Separate Statement of Commissioner Barrett attached to the July 15 order. See infra p. 8.

[2/] American PCS, L.P., d/b/a American Personal Communications ("APC"), a partnership in which APC, Inc. is the managing general partner and The Washington Post Company is an investor/limited partner.

[3/] This same usage of the word "free" would apply to every patent, copyright, and trademark. Thomas Edison would be surprised to learn that he was considered to have obtained his patent to the lightbulb "for free." Charles Dickens, who

We believe the so-called "competitive implications" of failing to impose charges on broadband PCS pioneers are simply, and demonstrably, a phantom concern. But if these "competitive implications" are important enough to form the basis for the Commission's extraordinary remand request to the Court of Appeals and for the drastic action apparently contemplated by the Commission, they deserve to be briefed before the Commission. And the most timely way to do that is by oral argument.[4/]

I.

These sorts of so-called "competitive implications" are part of the everyday landscape with which the Commission is familiar. For many spectrum-based industries, the Commission's authorizations constitute a substantial part of a business' value. This value is realized as, eventually, these businesses change hands. In any given television market, for example, one station may have obtained its license for free, while the others will have paid purchase prices which placed values on the licenses of greatly varying amounts because,

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campaigned for the protection of intellectual property around the world, would have similarly been outraged by the charge that his efforts to seek effective copyright recognition for his works constituted "unjust enrichment."

[4/] This Request is filed on the assumption that the Court of Appeals will remand this case to the Commission pursuant to its request. Even if this case is not remanded, the Commission could act on the pending petitions for reconsideration or impose payment as a condition of pioneers' licenses, in which event it should hear argument on the "competitive implications" issue.

among other reasons, they purchased the businesses at different times. Yet no one complains about the "competitive implications" of these disparities, and if someone did, the Commission would properly give them short shrift.

Or take another example. Twelve years ago some of the principals of APC participated on the nonwireline side of the cellular industry and did so in the same Washington/ Baltimore market at issue here. The wireline telephone industry (in this market, Bell Atlantic) received set-aside licenses -- practically speaking, guaranteed licenses just for the asking. The non-telephone competitors for the other cellular license in the market faced a protracted, expensive comparative hearing plus the likely disadvantage of competing against the Bell Atlantic headstart.[5/] After incurring heavy litigation expenses that Bell Atlantic did not have to bear because of its guaranteed license, its would-be competitors merged and thereby effectively gave up large ownership interests in their applications to avoid being left behind in the marketplace. Similar events occurred around the country, yet the "competitive implications" of those events were not thought to be relevant to the licensing or regulatory scheme at that time.

[5/] The Commission established a policy to protect against wireline headstarts but always found that the public policy in favor of inaugurating service prevailed over the "competitive implications" of the headstart. It never applied the headstart policy.

Later, Southwestern Bell purchased the nonwireline cellular system in this market at a price that reflected a very substantial valuation for the license. That fact combined with the fact that Bell Atlantic had paid virtually nothing for its license has not diluted competition between the two. Neither the marketplace nor competition was distorted as a consequence. Again, the same phenomenon occurred nationwide. If Southwestern Bell or other non-telephone company licensee had raised this as an issue for the Commission to consider -- for example, by requesting that the Commission use its Section 4(i) authority to impose charges upon Bell Atlantic equivalent to the costs incurred by Southwestern Bell in acquiring its cellular interests -- it properly would have been rejected as utterly frivolous.

The Commission also has ignored any "competitive implications" that arise by virtue of PCS licensees being burdened by auction and microwave-relocation fees. PCS operators' principal competition will come from the two entrenched cellular carriers and the ESMR operator.[6/] These

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[6/] The Commission has repeatedly emphasized that "[b]roadband PCS will provide a variety of mobile services that will compete with existing cellular services." Implementation of Section 309(j) of the Communications Act, Fifth Report and Order, FCC 94-178, slip op. at 3 (PP Docket 93-253, July 15, 1994); see Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, FCC 94-144, slip op. at 3 (Gen. Docket 90-314, June 13, 1994) ("PCS will provide a variety of mobile services competitive with existing cellular, paging and other land mobile services"). Cellular licenses are creating PCS look-alike services right now in anticipation of this competition, including Bell Atlantic's just-announced "PCS

licensees originally obtained their licenses for free (without any of the pioneer's costs, risks or contributions).[7/] They also were not burdened, as all PCS operators will be, with the costs of relocating microwave links. Yet, any "competitive implications" raised by uniquely burdening the newcomer PCS operators with the costs of auctions and microwave relocations did not stand in the way of the Commission's imposing these burdens. In fact, these burdens weren't even considered relevant. If the advantages the Commission has conferred on PCS's competitors do not warrant any weight, as apparently they did not, it is difficult to understand why weight should be given to any "competitive implications" of the pioneers receiving their licenses for "free."[8/]

The PCS marketplace, though still embryonic, confirms that these "competitive implications" are not significant if they exist at all and that this situation is analogous to the television and cellular examples described above (and entirely unlike narrowband PCS, in which all nationwide competitors will be newcomers). Thus, many believe that the second 30 MHz MTA license in the pioneer markets will

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Now" service.

[7/] The most galling irony, of course, is that Pacific Bell and Bell Atlantic were massive beneficiaries of this true give-away.

[8/] Note also that there is not a word in comments or Commission statements about the "competitive implications" of permitting "designated entities" to participate in a separate block in which bids will be lower, plus receiving significant bidding credits.

yield a substantial bidding premium. In fact, Pacific Bell itself complained to Communications Daily three days ago that "Southern California spectrum is likely to go for much more money than normal" because there would be only one license available for auction in the San Diego MTA.[9/] If the "competitive implications" that trouble the Commission actually exist, the marketplace -- and Pacific Bell itself -- would not be anticipating premium bids for the other MTA license in the pioneer markets.

Even if these "competitive implications" did exist, the PCS auction process would adjust for them. Bidders for the other 30 MHz license would make lower bids as a reflection of these "competitive implications." The bids would be reduced to the point where their PCS businesses would be viable and competitive. Although a consequence of this hypothetical adjustment might be lower auction revenues, the statute enacted last year expressly prohibits the Commission from taking this consideration into account.

If "competitive implications" are to be the touchstone for the Commission's decisions regarding the award of pioneer preference licenses for broadband PCS, the true "competitive" factors in the broadband PCS market strongly argue in favor of confirming the Commission's December 23, 1993 decision refusing to modify the pioneer rules as they

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[9/] Pacific Bell to Reenter Wireless Market, Communications Daily, July 18, 1994, at 3-4 (comments of Lyn Daniels, president of Pacific Bell PCS subsidiary).

apply to broadband PCS. As noted above, the Commission claimed in its Mtel order that it had come to a "greater" understanding of the role of competition in PCS as a result of its orders regarding competitive bidding and the auction process, but those orders nowhere discuss the implications of "free" pioneer licenses on PCS competition or on PCS bidding.

However, the separate statement of Commissioner Barrett attached to the Commission's July 15, 1994 order details the factors that are important in assessing the effectiveness of the Commission's auction orders, including:

> "the relative economic leverage of existing telecommunications providers in terms of cost of capital, investment in infrastructure, existing revenue, cashflow, earnings and market value, economies of scale, market penetration, vendor relationships, customer and billing relationships, and access to subsidized funding or market price formulas." Id. at p. 2.

Commissioner Barrett then described the $195.5 billion in revenues, $61.9 billion in earnings, $86.7 billion in cumulative book value possessed by the "largest telecommunications providers" which show that they "could dominate" all PCS license auctions. Id. at 3. On this basis, he stated that "the combined impact of [their] market leverage and the incentive to reduce billions of dollars in [their] fixed costs would likely eliminate smaller companies and new entrants from successful bids for PCS licenses," absent special treatment of such entities. Id. While Commissioner Barrett expressed these views in connection with the bidding credits and other advantages that the Commission made

available to "designated entities" in its July 15 order, they are equally applicable to the assessment of competition between APC and other successful PCS pioneers, on the one hand, and telecommunications giants, like PacBell and Bell Atlantic who are leading the attack against the grant of PCS licenses to the pioneers, on the other hand.

There is much more that can and should be said about the "competitive implications" issue, including an explanation of the invalidity of its basic premises. But that would be the purpose of the oral argument we urge the Commission to schedule -- to air an issue that apparently is critical to the Commission, that has surfaced after the twelfth hour and that has never been briefed before the Commission.

II.

Even assuming arguendo that "competitive implications" argue in favor of APC and other pioneers making some payment for their licenses,[10/] there is no basis for the 90 percent payment standard that the Commission recently applied to Mtel. There are competing factors that should mitigate, if not completely outweigh, the effect of any "competitive implications" on the level of payments to be made by the pioneers. As the Commission's own Motion to the Court says, it should also take "account of all the relevant

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[10/] In making this argument, APC does not concede that the Commission has authority under § 4(i) or any other provision of the Communications Act to impose substantial charges upon pioneers for their licenses.

circumstances and the competing equities." These other factors include:

- Equities: The Commission should take into account the justifiable reliance placed on the Commission's (and the government's in general) holding out the pioneer preference policy on numerous occasions and the stimulus to innovation which that reliance generated and which will benefit other PCS operators and users. Commissioner Barrett has been particularly effective in articulating the basic principles of fairness that are at stake in this matter.[11/] Given APC's history of four years of creative and high-risk efforts to benefit the PCS industry and the public, its reliance on the Commission's pioneer preference policy should be given at least the same consideration the Commission gave cellular lottery applicants on the very day after it released its Mtel order.[12/]

[11/] See Review of the Pioneer's Preference Rules, Notice of Proposed Rule Making, 8 F.C.C. Rcd. 7692, 7696 (1993) (Barrett, Comm'r, dissenting in part, concurring in part) ("To subject pioneer preference applicants in the 2 GHz PCS docket to possible repeal of these rules at this late date is neither reasonable or necessary . . . I believe this action constitutes the ultimate public policy 'bait and switch'").

[12/] In Implementation of Section 309(j) of the Communications Act, FCC 94-123 (PP Docket 93-253, July 14, 1994), the Commission found that unserved area cellular lottery applicants had "equity" and "reliance" interests in their lottery applications that were sufficient to defeat the imposition of auction fees -- even though all these applicants had done was file simple applications. This result, when

- Comparison with designated entities. Designated entities will receive bidding credits of up to 25 percent and various other substantial benefits including 10-year installment payments, low interest payments, and freedom to use whatever technologies they prefer. Pioneers, who have ventured so much over the past five years, should be treated no worse than designated entities; i.e., they should pay *no more than 75 percent of other winning bids.*[13/]
- Reference Point. The benchmark to which the not-more-than 75% standard should be applied should be *the national average auction price* because the pioneers' contributions were national in scope. For example, without APC's development of a strategy for using the appropriate spectrum for PCS and its

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juxtaposed with the result in Mtel and the result contemplated here, demonstrates the inequity of this last-minute shift in policy as to the PCS pioneers.

As the Commission knows, reviewing courts can have particular difficulty reconciling diametrically opposed results in decisions reached in the same time frame. See, e.g., Telephone & Data Systems, Inc. v. FCC, 19 F.3d 655 (D.C. Cir. 1994) & oral arg. tr. 33, remarks of Wald, J. ("in 14-1/2 years of sitting on this Court, I find the ability to figure out what was going on between Friday's case and today's case one of the most difficult tasks I have come across").

[13/] The pioneers should also be entitled to the installment/low interest advantages provided to designated entities. All pioneers also should be able to take advantage of the royalty and other proposals advanced by Omnipoint. We see no reason why the pioneers should not be treated similarly, and, in any event, APC, Inc. should not be penalized for seeking financing from one investor rather than several with less-than-25-percent interests.

invention of a technology permitting that spectrum to be shared with microwave users on a highly efficient basis, PCS would not be ready to bring to the Treasury the auction revenues that are projected today. All PCS operators and users will benefit from APC's pioneering. Moreover, the potentially enormous penalty of calculating pioneers' payments based on the second MTA license in their markets[14/] should be avoided by *excluding from the national average the highly skewed bids for the Block B MTAs in the pioneers' markets.*[15/]

[14/] Thus, the Washington/Baltimore MTA has about 8.1 million inhabitants, or "pops". If valued at $20 per pop, each of the two MTA licenses would be worth $162 million if both were to be auctioned. Assuming that the winning bid for the non-pioneer MTA license for Washington/Baltimore is raised by a 50% one-of-a-kind premium, that license would auction for $243 million. If as the pioneer APC were required to pay 80 percent of that amount, its payment would be $194.4 million or $48.6 million more than the value of the license. (We use the 80% figure urged by Vice President Gore for future pioneers. Presumably for those pioneers who had already relied on the pre-existing policy, he would see the justice of a substantially lower percentage.) This would be on top of $30 million of high-risk, sunk costs incurred by APC in reliance on the FCC's four-year, ten-times-reaffirmed promise of a "free" license for pioneers.

[15/] The awards of 30 MHz MTA licenses to the pioneers should not be reconsidered or altered upon any remand. That is the size of the market necessary to enable pioneers, in the public interest, to seek to realize PCS's great potential. The inequities of any other alternative award, as we have pointed out before, are overwhelming. See, e.g., APC, Further Comments on Spectrum Blocks for Competitive Bidding and Scope of Preference Award (PP Docket 93-253, Gen. Docket 90-314 and ET Docket 93-266, June 22, 1994).

If the Commission were to adopt the same 90/10 standard that it applied to Mtel, it would have given virtually no weight to these factors because APC's costs alone would consume, and exceed, the 10 percent "balance." Thus, if the Commission is to abide by the promise it made to the Court of Appeals to take into account "all relevant circumstances", it must not and cannot follow the approach it adopted in Mtel. The issue of what weight to give to these other factors in contrast to the weight to be given to "competitive implications" also calls for appropriate briefing at the oral argument.

III.

APC recognizes the need for expedition and has urged expedited treatment of all pioneer preference issues before the Commission and the Court of Appeals. A comment and reply period on the Commission's newly minted "understanding" of the "competitive implications" issue, given the Commission's commitment to the Court, may not be practical. But as the Commission recognized in empaneling its en banc hearing to provide a full record on PCS reconsideration issues, oral presentation of the issues before the Commission can be an efficient and effective mechanism to facilitate a better understanding of the issues.

The Commission is obligated by the Communications Act to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of

justice,"[16] and by the Administrative Procedure Act to "give interested parties an opportunity to participate in [rule making proceedings] through submission of written data, views or arguments with or without opportunity for oral presentation."[17] Under these statutory provisions, the Commission has permitted oral argument in rule making proceedings, particularly those involving the specific interests of certain parties.[18] In this case, where full written comment-and-reply procedures apparently will be unavailable, opportunity for oral argument is the least time-consuming procedure that will give the Commission the benefit of the parties' views.

Perhaps the best and most recent example of this principle was the Commission's expeditious assembly of advocates for various parties to argue the positions taken on petitions for reconsideration of the PCS docket on April 11-12, 1994. There are at least two important similarities between the need for that proceeding and this one. First, in each case the Commission has been presented with complex issues based on PCS market structure and economics that should

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[16] 47 U.S.C. § 4(j); see Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, 7 F.C.C. Rcd. 4688, 4693 (1992).

[17] 5 U.S.C. § 553.

[18] See, e.g., Public Notice, "Notice of Hearings in Turner Broadcasting/CBS, Inc. Transfer," July 11, 1985; Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975).

be resolved on an expeditious schedule. Second, in this case the record is devoid of essential facts necessary for the Commission properly to consider the issues and in the PCS reconsideration proceeding the Commission similarly felt that it needed additional briefing on certain issues.

In this case, the matters to be resolved on remand (or reconsideration) are of paramount importance to a discrete number of parties who have devoted enormous efforts to their proper resolution. This is not a case in which the Commission "seeks to promulgate rules which are general in nature and are intended to affect all licensees in the same classes equally."[19/] Rather, it is a case in which the Commission apparently intends to impose millions of dollars in mandatory payments upon three specific parties. It is simply unimaginable that a court would consider levying fees of such magnitude on private parties without permitting them an opportunity to address the merits of the economic arguments on which the Commission apparently intends to rely.

There is an additional and compelling consideration here that did not exist on PCS reconsideration or in the cases in which the Commission has held oral argument. Despite the resolution of ex parte issues in favor of the pioneers,[20/]

[19/] Simplification of Licensing and Call Sign Assignments in the Amateur Radio Service, 71 F.C.C.2d 559, ¶ 11 (1979) (denying request for oral argument).

[20/] See Letter from Andrew S. Fishel, Managing Director, to Michael K. Kellogg, May 27, 1994.

some Commission decisionmakers are reluctant to discuss in permissible ex parte meetings the non-restricted rule making issue of the inequities of imposing harsh payments on pioneers. If no oral argument is held, no comments are received and proper ex parte presentations are avoided, the Commission will have relied on a mistaken assumption about the existence of "competitive implications" without the benefit of the parties' views.

* * *

For the foregoing reasons, we urge that the Commission set oral argument for any day within the next week.[21/] This would leave the Commission with more than a week to take action consistent with its pledge to the Court to issue a decision within two weeks after the case is remanded (or to act on reconsideration). Using court procedure as a general model, the PCS pioneers should be given an hour to present their views, the Commission staff, which presumably favors a heavy payment, should be given 45 minutes to present its views, and the petitioners in the currently pending appeal

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[21/] We would oppose any procedure, including the oral argument that we request here, that would delay resolution of these issues and, in particular, endanger the October 11 date schedule for oral argument before the Court of Appeals. The delays in processing the pioneers' preference requests and their license applications (pending, in the case of APC, since January 1994 without being placed on public notice) have severely injured the pioneers and, more importantly, disserved the public interest. The key opponents of the pioneers stand to gain enormously (and competition suffer enormously) by delay, and thus far, it is sad to say, their tactics have been wildly successful.

should be given 15 minutes. Brief periods should be permitted for rebuttal. These are only suggestions, and many variants would be acceptable to us.

The plain fact, in sum, is that the Commission appears poised to charge the pioneers a potentially enormous fee without a shred of statutory support, in the teeth of the express language of last year's auction legislation, and contrary to fundamental principles of equitable reliance and the presumption against retroactivity. Surely, so serious a step warrants the procedural precaution of oral argument.

Respectfully submitted,

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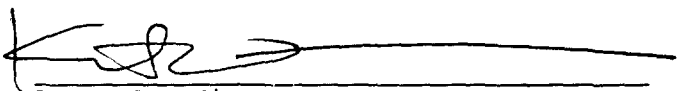
CERTIFICATE OF SERVICE

I, Kurt A. Wimmer, hereby certify that a copy of the foregoing pleading has been sent by hand delivery or by United States mail, first class postage prepaid, to the parties of record in ET Docket 93-266 and Gen. Docket 90-314 on this 21st day of July, 1994.



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